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(36923)

IN THE

Supreme Court of the United States

October Term, 1962

No. 452

VITO F. LANZA and CHARLES F. RANK,

Appellants,

against

ROBERT F. WAGNER as Mayor of the City of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

MOTION TO DISMISS

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IN THE

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VITO F. LANZA and CHARLES F. RANK,

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against

ROBERT F. WAGNER as Mayor of the City of New York and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

MOTION TO DISMISS

Appellee Wagner, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss this appeal from the final order and judgment of the New York Court of Appeals which modified the dismissal of the complaint by providing judgment for the defendants declaring that (1) Chapter 971 of the New York Laws of 1961 is constitutional, and (2) adjudging that it was proper for defendant Mayor of the City of New York to appoint new members to the Board of Education in accordance with the statute, on the ground that it does not present a substantial federal question. As to one of the asserted federal questions we make the additional argument that the matter was not raised or passed upon in the New York courts.

The appellants have petitioned this Court for a writ of certiorari to review the aforesaid order and judgment of the New York Court of Appeals. The appellees have filed

a brief in opposition to such petition (October Term, 1962, Docket No. 334).

Reported below: 30 Misc. 2d 212, 220 N. Y. S. 2d 477; 15 AD 2d 552, 222 N. Y. S. 2d 1019; 11 N. Y. 2d 317, 183 N. E. 2d 670. In addition, an unreported opinion of the New York Supreme Court, Kings County, handed down one week prior to the reported opinion of that Court, is printed as Appendix I in the Petition for Certiorari herein (Docket #334).

Questions Presented

The appeal presents the following questions:

1. Are substantial constitutional questions worthy of review by this Court presented by the appellants' contention that Chapter 971 of the New York Laws of 1961, by providing for the termination of the appellants' terms of office as members of the Board of Education of the City of New York on September 20, 1961, violates (1) the due process clause of the fourteenth amendment, and (2) the provisions of the United States Constitution (Art. 1, §10) that no State shall pass any bill of attainder?

2. Do appellants have standing in this Court to assert that the statute, insofar as it provides for the method of nomination and appointment of new school board members, is violative of Art. IV, §4 of the United States Constitution which guarantees to each State a republican form of government; and if so, does such assertion present a substantial justiciable issue?

3. Does the appellants' contention that the statutory provision for the selection and appointment of new school board members denies them the equal protection of the laws present a substantial federal question?

Statement

On August 21, 1961, the Legislature of the State of New York, at an Extraordinary Session convened by the Governor for the specific purpose of dealing with conditions then existing in the public school system of the City of New York, enacted Chapter 971 of the New York Laws of 1961, which reorganized and reconstituted the school board of the City of New York. In its enactment the Legislature found and declared that "The conditions existing in the school system of the City of New York have shaken public confidence, cause the legislature grave concern and call for prompt corrective action. These conditions include—irregularities in the school construction program—serious hazards in school buildings due to inadequate maintenance and improper repairs—instances of corruption among employees—staggering administrative complexities and needless red tape. The commissioner of education has warned that this is a time of crisis for the New York City schools and has urged prompt corrective action. The educational well-being of almost one million children is directly affected." (§1).

To cope with this situation the Legislature determined that the appointment of school board members from lists of nominees submitted to the Mayor by a selection panel composed of the responsible officers of representative educational, civic, business, labor and professional organizations active or interested in the field of education would be calculated to result in the appointment of persons of outstanding experience, competence and qualification for service on the board of education (Laws of New York, 1961, ch. 971, §§3, 5). It likewise was the judgment of the Legislature that such method of selection and appointment should promptly be put into effect so that public confidence might be re-

stored and conditions in the school system alleviated as expeditiously as possible (id., §3). The prompt institution of this new method of selection was further indicated by the fact that the Legislature intended to grant emergency powers to the board of education to deal with the emergency situation (id., §§6, 7). Accordingly, the Legislature provided that a new board of education, selected in the new manner, be appointed within 30 days and that the terms of office of the persons then comprising the membership of the Board of Education simultaneously terminate.

On September 18, 1961, the appellants, whose terms as members of the Board of Education of the City of New York would, pursuant to the terms of §2 of such statute, terminate on September 20, 1961, commenced an action for a declaratory judgment (1) declaring the new statute unconstitutional and (2) enjoining the Mayor from appointing new board members in the place and stead of the petitioners, pursuant to the provisions of the statute. In their complaint, the appellants made the conclusory allegation that the statute was unconstitutional and void in purporting (1) to terminate the balance of their terms of office on September 20, 1961, and (2) to provide that new members shall be nominated and appointed by the Mayor in the manner provided by the statute. They alleged that "under the provisions of the Home Rule Amendment to the Constitution of the State of New York [N.Y. Const., Art. IX, §9] and the provisions of the City Charter of the City of New York, Plaintiffs have a legal and constitutional right to serve out the balance of their terms as members of the said Board of Education, and the Defendant, Mayor of the City of New York, is without legal or constitutional authority to appoint new members of the said Board of Education in the place and stead of the Plaintiffs."

On the following day, in an application to the New York Supreme Court, Kings County, for a temporary injunction restraining the imminent appointment of new members of the board of education by the Mayor, the appellants' primary argument against the validity of the statute was its alleged conflict with the home rule (Art. IX, §9) provisions of the New York State Constitution. Only in response to questions by the Court did they allege generally that the statute was in the nature of a bill of attainder and that it was violative of the fourteenth amendment. The New York Supreme Court, Kings County, denied the application for the temporary injunction and dismissed the complaint as being without merit. 30 Misc. 2d 212, 220 N.Y.S. 2d 477 (1961). In their appeal to the Appellate Division, the petitioners abandoned the contention that the statute was a bill of attainder. The Appellate Division unanimously affirmed the dismissal of the complaint. 15 AD 2d 552, 222 N.Y.S. 2d 1019 (1961). On appeal to the Court of Appeals of the State of New York the statute was again upheld. However, to conform to New York practice, the judgment below dismissing the complaint was modified to provide judgment for the defendants declaring that (1) Chapter 971 of the Laws of 1961 is constitutional, and (2) adjudging that it was proper for defendant Mayor of the City of New York to appoint new members to the Board of Education in accordance with the provisions of the statute. 11 NY 2d 317, 183 N.E. 2d 670 (1962).

POINT I

Chapter 971 of the New York Laws of 1961, by providing for the termination of the appellants' terms of office on September 20, 1961, did not deprive appellants of due process nor was it a bill of attainder.

(1)

The appellants' office, having been created by statute rather than by the Constitution of the State of New York, was, in the absence of specific constitutional inhibition, subject to the plenary jurisdiction of the Legislature. A legislature, acting in the public interest and addressing itself to the office rather than at the incumbent, can abolish or shorten the term of an office of its creation notwithstanding such action may curtail the incumbent's unexpired term. Public offices are created for the benefit of the public and not granted for the benefit of the incumbent, and the officeholder has no contractual, vested or property right in the office. *Phelps* v. *Board of Education of West New York*, 300 U. S. 319, 323 (1937); *Dodge* v. *Board of Education of Chicago*, 302 U. S. 74, 78-79 (1937); *Conner* v. *City of New York*, 5 N. Y. 285, 295-296 (1851); *Long* v. *Mayor, etc. of City of New York*, 81 N. Y. 425, 427-428 (1880).

That the legislation complained of was aimed at the office, not the incumbents, is indisputable. The emergency conditions in the public schools in the City of New York required prompt corrective action. It was the duty of the Legislature to take all reasonable and necessary measures to alleviate the conditions. The obvious answer to any claim by the appellants that the constitutional provision for due process protects officeholders against arbitrary and whimsical action even when their holding of public office does not involve contractual, vested or property rights (see *Wieman*

v. *Udegraff*, 344 U. S. 183, 192 [1952]) is that the action herein cannot be so characterized.

(2)

The appellants' attack on the statute as being a bill of attainder is similarly without merit. Neither the purpose nor the effect of the statute was to punish incumbent school board members. As was hereinabove pointed out, the termination of the appellants' term of office was an unavoidable result of proper legislative action affecting the positions which they held. General legislation such as the statute herein, designed solely to provide a more effective and efficient body, and aimed at the office of school board members rather than at the incumbent officeholders, has none of the characteristics of a bill of attainder (see *Garner* v. *Los Angeles Board*, 341 U. S. 716, 722 [1951]).

United States v. *Lovett*, 328 U. S. 303 (1946), cited by appellants in support of their contention that the instant statute is a bill of attainder (Jurisdictional Statement, p. 9), is on its face clearly distinguishable from the case at bar. In fact, it becomes readily discernible from a mere reading of that decision that the challenged statute has none of the attributes of a bill of attainder. In the *Lovett* case, the House of Representatives, following a so-called investigation of certain individuals, found them guilty of "subversive" activities, and thereupon provided in an appropriation bill that such persons be forever barred from federal employment. Thus, the clear purpose and effect of the legislation was solely the punishment of these individuals by disqualifying them from all future federal employment. In the case at bar, the appellants had never been charged with or found guilty of wrongdoing nor have they been barred or disqualified from holding any office or employment. They have not been barred from or held ineligible for consideration for or appointment as school board mem-

bers in accordance with the newly devised method of selection and appointment of board members. The appellants, who had no vested or other right to be members of either the old or new Board of Education may not complain simply because they were not selected or appointed to the new board.

POINT II

Appellants have no standing in this Court to challenge the statutory provisions for the nomination and appointment of school board members based on Art. IV, §4 of the United States Constitution which guarantees to each state a republican form of government. In any event, the statute does not present any substantial constitutional questions either under (1) the guaranty clause (Art. IV, §4) or (2) the "equal protection of the laws" clause of the Fourteenth Amendment to the United States Constitution.

(1)

The claim that the statutory provisions for the nomination and appointment of school board members violate the Guaranty Clause of the United States Constitution is being raised by the appellants for the first time in this Court. In none of the pleadings, briefs or arguments below was this issue raised nor did any of the New York courts discuss or pass upon this question. Such failure to raise the federal question in the state courts precludes its consideration at this time. *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 655 (1897); *New York Central R.R.* v. *New York*, 186 U.S. 269, 273 (1902); Revised Rules of the United States Supreme Court, Rule 23 (1)(f). Moreover, since the terms of office of the appellants were validly terminated by Chapter 971 of the New York Laws of 1961, the appellants do not

have the specific interest or aggrievement necessary to challenge the statutory provisions relating to the nomination and appointment of new school board members. *Dorsey* v. *Stuyvesant Town Corp.*, 299 N. Y. 512, 521 (1949), cert. denied, 339 U. S. 981 (1950). Appellant Lanza, whose term of office as a member of the board of education of the City of New York would have expired in May, 1962 even if Chapter 971 of the New York Laws of 1961 had not been enacted (Complaint, par. 7), has no standing at this time to raise *any* questions and the proceeding as to him is moot.

The only questions which the appellants raised in the Court below with respect to the statutory provisions for the nomination and appointment of school board members were two purely state questions. One was whether there was a violation of the home rule provisions (Art. IX, §9) of the New York State Constitution, and the other was whether there was an unlawful delegation of legislative authority in violation of Art. III, §1 of the State Constitution that "the legislative power of this state [New York] shall be vested in the senate and assembly." The appellants may not now seek to subvert these purely state questions concerning the validity of legislation under a state constitution into a federal question regarding the republican form of government of a state. The decision by the Court of Appeals of the State of New York sustaining the legislative authority under the Constitution of the State of New York to enact the statutory provisions herein involved is final and not open to review. *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 612 (1937). Moreover, the Guaranty Clause is nonjusticiable. *Luther* v. *Borden*, 48 U. S. (7 How.) 1 (1849); *O'Neill* v. *Leamer*, 239 U. S. 244, 248 (1915); *Houck* v. *Little River Drainage District*, 239 U. S. 254, 262 (1915); *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District*, 281 U. S. 74, 79-80 (1930); *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 612 (1937).

In any event, we do not believe we need labor the point that a statutory plan whereby responsible officers of representative organizations interested or active in education are called upon to render a public service of nominating a list of exceptionally qualified persons from whom the elected Mayor of the City of New York can make appointments to the City Board of Education involves or in anywise affects or destroys the republican form of government of the State of New York.

(2)

The appellants' contention that the statute denies them the equal protection of the laws is similarly without merit. As was hereinabove pointed out, *supra*, pages 7-8, the appellants have not been barred from or held ineligible for consideration for or appointment as school board members in accordance with the newly devised method of selection and appointment of board members. Surely, the appellants cannot predicate a claim of unconstitutionality solely on the fact that they did not receive appointments.

CONCLUSION

Appellants have presented no substantial question for resolution by this Court. The appeal should be dismissed.

October 16, 1962.

Respectfully submitted,

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